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No. 77-1523

In the Supreme Court of the United States

OCTOBER TERM, 1977

JACK C. MILLER, CLAIMANT OF 8 TANKS, 308 DOSES AND 1 AMPULE OF BULL SEMEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion and order of the district court (Pet. App. 1A-2A) is not reported. The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3A-4A) was entered on February 22, 1978. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to April 23, 1978 (a Sunday), and on April 24, 1978, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the delay between the seizure of eight canisters of bull semen and the institution of civil forfeiture proceedings required dismissal of the forfeiture action.

STATEMENT

1. During a 12-month period ending November 16, 1973, petitioner was involved in a conspiracy whereby certain employees of the United Breeders of Guelph, Ontario, would steal from that company quantities of bull semen and sell it to petitioner, who would smuggle it into the United States (App. 34-41).[1] In November 1973 petitioner was arrested by Canadian authorities and charged with theft of bull semen (App. 61, 68-69). On the basis of information received from the Canadian authorities, county detectives of Montgomery County, Pennsylvania, obtained a search warrant, and, on November 21, 1973, searched petitioner's residence in that county and seized eight canisters of frozen bull semen (App. 52-55). The semen was turned over to the United States Customs Service on November 23 (App. 57) and retained as evidence in federal criminal proceedings charging petitioner with receipt, storage, and concealment of smuggled bull semen (App. 6).

2. By letter dated February 19, 1974, petitioner was informed by the Bureau of Customs that eight canisters of bull semen had been seized for violation of the United States Customs and related laws and that the penalties incurred were forfeiture of the seized articles and the payment of $7,765.60 in duty (App. 10). The letter further

[1]"App." refers to the Appendix filed by petitioner in the court of appeals.

advised petitioner of his right, under Section 618 of the Tarriff Act (49 Stat. 757, as amended, 19 U.S.C. 1618), to file a petition in remission or mitigation of the penalty. Petitioner failed to do so.

On March 19, 1974, after receiving *Miranda* warnings, petitioner gave a complete statement to Customs officials, detailing the circumstances of his smuggling activity (App. 34-42). He admitted that the semen contained in the eight canisters seized by Customs had been brought into the United States on at least seven separate occasions during the preceding year. He further stated that when entering the United States he would commingle in the canisters ampules of bull semen he had legitimately purchased in Canada with ampules that had been stolen, declaring only the former to Customs (App. 34-36).

On April 30, 1974, petitioner pleaded guilty in the United States District Court for the Eastern District of Pennsylvania to conspiracy (Count I) and to receiving and concealing smuggled goods (Count II) in violation of 18 U.S.C. 371 and 545. He was sentenced to three months' imprisonment on Count I. The sentence on Count II was suspended and petitioner was placed on five years' probation. In addition, a fine of $10,000 was imposed (App. 8).

3. In February 1977 petitioner filed a petition in the United States District Court of the Eastern District of Pennsylvania for return of the eight canisters of bull semen that had been seized by state authorities on November 21, 1973, and turned over to the Bureau of Customs of the United States Treasury Department (App. 5-9). On February 11, 1977, the government filed a civil complaint for forfeiture of the canisters (App. 17-20).[2] On

[2]The complaint alleged that the semen was subject to forfeiture under 19 U.S.C. 1592 and 18 U.S.C. 545. Under 19 U.S.C. 1592, any imported merchandise introduced into the commerce of the United

June 6, 1977, the district court denied the motion for return of the canisters in the criminal action, and entered a judgment of forfeiture in the civil proceeding (Pet. App. 1A-2A). The court of appeals affirmed (Pet. App. 3A-4A).

ARGUMENT

Petitioner argues (Pet. 3-5) that the delay of 38 months between the seizure of the semen and the institution of civil proceedings violated due process. At the outset, we note that petitioner failed to raise this objection in the district court (App. 27-30). On the contrary, he expressly conceded that some of the seized semen was properly subject to forfeiture, arguing only for the return of what he claimed was lawfully obtained or imported (App. 28-29). In light of that admission, the only issue presented at the hearing, as the district court stressed (App. 53, 61-62), was whether the semen claimed to have been lawfully obtained was so "commingled" with the smuggled quantities as to be also subject to forfeiture. See 19 U.S.C. 1592,[3] 1595a;[4]

States "by means of any fraudulent or false invoice, * * * any false statement, * * * or * * * any false or fraudulent practice" is subject to forfeiture. 18 U.S.C. 545 provides that merchandise introduced into the United States by fraudulent means or otherwise contrary to law "shall be forfeited to the United States."

[3]Section 1592 provides for forfeiture not only of the goods illegally imported, but of the "whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates."

[4]Because petitioner commingled the stolen semen with semen he had declared, to avoid paying duty on the former, forfeiture of the entire contents of the eight canisters also would be authorized under Section 1595a, which provides in pertinent part: "[E]very vessel, vehicle, animal, aircraft, *or other thing used* in, to aid in, or to facilitate * * * the importation * * * of any article * * * into the United States contrary to law * * * shall be seized and forfeited * * *" (emphasis added).

Buckley v. *United States*, 4 How. 251, 262.[5] The resolution of that factual question against petitioner plainly does not call for review by this Court.

Moreover, because of petitioner's concession in the district court, the government was not called upon to make a factual record to explain its delay in initiating the forfeiture proceeding.[6] Accordingly, this in not an appropriate case for this Court's consideration of the question of timeliness in forfeiture actions, or the proper remedy if the government is deemed guilty of laches.

In any event, petitioner can show no prejudice resulting from delay. Unlike the usual situation, he had, within five months of the seizure, admitted facts which precluded any defense to forfeiture. And he has not asserted that the government's delay prevented him from adducing any relevant evidence at the hearing held in April 1977. In

[5]In *Buckley*, the Court said (4 How. at 262):

> [T]he jury * * * [is] not restricted in the condemnation of the goods to any entered goods which they [find] undervalued, but * * * they might find either the whole package or the invoice forfeited, though containing other goods correctly valued, if they should find that such package or invoice had been made up with intent to defraud the revenue of the United States.

[6]The semen was not retained as evidence only for the United States criminal proceedings. Criminal charges were brought against petitioner by Canadian authorities in regard to the bull semen that had been stolen from United Breeders of Canada (App. 6) and that case was not concluded until the fall of 1975. In addition, the government was restrained by the district court. In October of 1975 from destroying any of the semen, pursuant to a civil action brought by the Pennsylvania Holstein Association, in which that Association claimed rights to certain of the semen. That action was not disposed of until December 30, 1975, when it was dismissed by stipulation (Government's Brief on Appeal, Exhibits A and B).

those circumstances, we submit, it would be inappropriate to vacate the forfeiture even if the government had been too slow.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] The Court has held that the remedy for a violation of the Due Process Clause because of failure to hold a hearing should be no more than necessary to compensate for injury inflicted by the deprivation. *Carey* v. *Piphus*, No. 76-1149, decided March 21, 1978. See also *Codd* v. *Velger*, 429 U.S. 624 (no hearing was necessary where plaintiff did not contend that the absence of a hearing caused or increased the possibility of a mistaken decision). Consequently, a showing of prejudice should be a minimum prerequisite where, as here, petitioner seeks a remedy (cancellation of the forfeiture proceeding and return of the seized articles) that is considerably broader than simple compensation for delay.